



Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25 - 720
Regulation title	Water Quality Management Planning Regulation
Action title	Amend Nutrient Waste Load Allocations in Section 720-50.C. to Transfer Unused Allocations to Certain Dischargers to Maintain Potomac Basin Cap
Date this document prepared	

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this intended regulatory action is to identify unused nutrient waste load allocations [WLAs] assigned to dischargers within the Shenandoah-Potomac River Basin. These allocations may then be transferred to offset additional allocations assigned to certain other dischargers who the State Water Control Board determines did not receive an equitable share of the total basin allocation, thereby maintaining the basin point source allocation cap and protecting water quality.

At its April 27, 2009 meeting, the State Water Control Board took several actions, summarized as follows:

1. Adopted additional allocations due to technological limitations of treatment for the Merck-Stonewall discharge effective January 1, 2011 that may be reduced based on results of a full-scale technology study and conditioned on securing available credits to maintain the Basin nutrient loading cap for point sources;
2. Directed DEQ to initiate a rulemaking to reduce or remove allocations that are not being used by other facilities within the Shenandoah-Potomac River Basin, preferably in the area of Merck's discharge, to offset the needed increased nitrogen and phosphorus allocations for Merck; and,
3. Directed DEQ to provide the Board with an annual report on unused nutrient allocations for each significant discharger.

Regarding action #2, the intent is for Merck to negotiate the purchase of allocations and have these purchases finalized by a change in the Water Quality Management Planning [WQMP] Regulation. Among the facilities whose unused allocations are to be considered are the former Pilgrims Pride Alma facility and the Shenandoah County – North Fork Regional WWTP. The total allocation from these two facilities would exceed Merck’s need for additional nitrogen allocation and meet about half of Merck’s need for additional phosphorous allocation. If a negotiated purchase of allocations is not successful, the Board may amend the WQMP regulation for certain dischargers to secure the needed allocations so the point source nutrient load cap for the Basin is maintained.

In addition, the Board is considering at least one other case for an additional allocation for a discharger [Fauquier County Water and Sanitation Authority’s Vint Hill WWTP] claiming they did not receive an equitable share of the basin point source nitrogen allocation cap. Therefore, this rulemaking will also consider identifying unused allocations that might be re-assigned to other dischargers.

The goal of this rulemaking is to ensure an equitable distribution of nutrient allocations for dischargers within the Shenandoah-Potomac River Basin that maintains the nutrient load cap for the basin necessary to protect water quality within the river basin and the Chesapeake Bay.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 62.1-44.15 of the Code of Virginia is the source of legal authority identified to promulgate these amendments. The promulgating entity is the State Water Control Board.

The scope and purpose of the State Water Control Law is to protect and to restore the quality of state waters, to safeguard the clean waters from pollution, to prevent and to reduce pollution and to promote water conservation. The State Water Control Law (Code of Virginia) at § 62.1-44.15(10) mandates the Board to adopt such regulations as it deems necessary to enforce the general water quality management program of the Board in all or part of the Commonwealth. In addition, § 62.1-44.15(14) requires the Board to establish requirements for the treatment of sewage, industrial wastes and other wastes that are consistent with the purposes of this chapter. Setting the specific effluent limits needed to meet the water quality goals is within the discretion of the Board.

The correlation between the proposed regulatory action and the legal authority identified above is that the amendments being considered are modifications of the current requirements for the treatment of wastewater that will contribute to the protection of Virginia’s water quality. State Water Control Law (Code of Virginia) web site: <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

In late 2005, the Board adopted nutrient WLAs for 125 significant dischargers within Virginia’s portion of the Chesapeake Bay watershed, including 45 in the Shenandoah-Potomac River Basin. At that time, the Board also authorized the DEQ Director to: (1) receive any petition requesting amendment of the adopted

nitrogen or phosphorus allocations on the Board’s behalf, and (2) upon completion of the public comment period on the petition, proceed to initiate a rulemaking on any petition received. The Board facilitated the petition process in recognition that inequities may surface in the original assignment of WLAs for certain dischargers. However, if increased allocations are determined to be justified for certain dischargers, then there is also the need to find offsetting allocations in order to protect water quality and not exceed the total nutrient allocation cap for the basin.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

The WQMP regulation assigns WLAs for the Merck-Stonewall facility as follows: Total Nitrogen WLA of 14,619 lbs/yr and Total Phosphorus WLA of 1,096 lbs/yr. At its April 27, 2009 meeting the State Water Control Board approved the following amendment to the Merck-Stonewall WLAs: on January 1, 2011, the following waste load allocations [WLAs] are effective and supersede the existing WLAs: total nitrogen of 43,835 lbs/yr and total phosphorus of 4,384 lbs/yr;

In addition, a rulemaking process is currently underway that is considering an increase to the total nitrogen WLA for the Fauquier County, Water & Sanitation Authority’s Vint Hill Wastewater Treatment Plant. A proposal currently being considered to amend this facility’s total nitrogen WLA is:

- Based on design flow = 0.95 MGD (if plant expands, from 0.6 MGD, by 12/31/10)
- TN = 4.0 mg/l; 11,573 lbs/year (an increase of 2,893 lbs/yr)
- If plant not expanded, TN = 7,309 lbs/yr (an increase of 1,827 lbs/yr).

In order to offset these approved, or potential, higher WLAs, DEQ, in conjunction with a regulatory advisory panel, will work to identify unused allocations that could be applied to the dischargers that warrant additional allocations. Among the facilities whose unused allocations will be considered are the former Pilgrims Pride Alma facility [TN WLA of 18,273 lbs/y and TP WLA of 914 lbs/yr] and the Shenandoah County – North Fork Regional WWTP [TN WLA of 9,137 lbs/yr and TP WLA of 685 lbs/yr].

Finally, since the assigned WLAs in the WQMP regulation protect water quality in the tidal Potomac River and the Chesapeake Bay, any redistribution of allocations that are the subject of this rulemaking will be determined using delivered loads, which provides for an equivalent exchange among dischargers no matter where they are located within the river basin.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

Alternatives being considered by the agency include, but are not limited to, the following:

- Reduce or remove Chesapeake Bay nutrient WLAs for one or more dischargers as currently listed in 9 VAC 25-720 to offset approved increased WLAs for other dischargers.
- Reduce or remove Chesapeake Bay nutrient WLAs for one or more dischargers as currently listed in 9 VAC 25-720 to offset any proposed increase in WLAs for other dischargers.

- Defer action to reduce or remove Chesapeake Bay nutrient WLAs for one or more dischargers as currently listed in 9 VAC 25-720 until EPA proposes or approves the Chesapeake Bay TMDL[s] for nutrients.

The agency, in conjunction with a regulatory advisory panel and other state and federal agencies (as appropriate) will consider these and other alternatives within the context of achieving water quality standards in the local receiving waters, the Potomac River and Chesapeake Bay. Alternatives provided by the public will also be considered.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, 3) potential impacts of the regulation and 4) impacts of the regulation on farm and forest land preservation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Alan E. Pollock, DEQ Office of Water Quality Programs, P.O. Box 1105, Richmond VA 23218; phone - 804-698-4002; fax – 804-698-4116; alan.pollock@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the last day of the public comment period.

Public Hearing at Proposed Stage

A public hearing will not be held after publication of the proposed stage of the regulatory action unless requests for a public hearing are received during the NOIRA public comment period from at least 25 persons.

Regulatory Panel

Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.

The Board is using a panel to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the panel is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the panel will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The direct impact resulting from the assignment of waste load allocations limiting the discharge of nutrients from wastewater treatment plants is for the protection of public health and safety. There is no direct impact on the institution of the family and family stability.